(1)

Supreme Court, U.S.
FILED

No. 02 1 1 6 MAY - 6 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

HECTOR P. GONZALEZ,

Petitioner,

versus

HONORABLE JOHN J. SPECIA, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

LAW OFFICE OF HECTOR P. GONZALEZ, P.C.
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HECTOR P. GONZALEZ
Pro Se
Texas Bar No. 08127000

QUESTIONS PRESENTED

It is the contention of the Petitioner that the trial court below denied him due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution by the following actions:

1.

by unilaterally reinstating sanction orders which had been vacated over 200 days previously;

2.

by holding him in contempt for failure to pay monetary sanctions that had been set aside by an order granting a new trial and vacating those sanctions but which were *sus ponte* reimposed by the trial court below without a written motion before the court, without any notice that a hearing was to be held concerning said issue;

3.

by continuing to take actions against Petitioner after said court had lost jurisdiction over the subject matter and over the Petitioner by the Petitioner having appealed these matters to the Fourth Court of Appeals;

4.

by ordering the imprisonment of Petitioner for debt in violation of Article I, Section 18 of the Texas Constitution;

5.

by refusing Petitioner, an officer of the court, the right to have another judge appointed to determine his guilt or innocence.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Petitioner

   Hector P. Gonzalez
   Counsel for Plaintiffs, Sheila Garza and Isidra Garza, in Cause No. 2001C102890; Sheila Garza and Isidra Garza vs. CMH Homes, Inc. d/b/a Clayton Homes and Vanderbilt Mortgage and Finance, Inc.; 131st Judicial District Court, Bexar County, Texas

2. Respondent

   Honorable John J. Specia, Jr.
   Judge, 225th District Court
   Bexar County Courthouse
   100 Dolorosa Street
   San Antonio, Texas 78205

3. Counsel for Defendants

   Ed Walton
   The Law Offices of Ed Walton
   401 N. Adelaide St.
   Terrell, Texas 75160

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PETITION FOR A WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the per curium opinion of the Supreme Court of Texas, Austin, Texas, entered in this action on March 1, 2002 (and the per curium opinion denying Petitioner's motion for rehearing on April 8, 2002).

OPINIONS BELOW

The trial court judgment is not reported. App. G

The Fourth Court of Appeals of San Antonio, Texas denied Petitioner's application for writ of habeas corpus and his motion for rehearing without opinion. Apps. B and D

The Texas Supreme Court denied the Petitioner's application for writ of habeas corpus and his motion for rehearing without opinion. Apps. A and C

BASIS FOR JURISDICTION

Jurisdiction rests upon 28 U.S.C. § 1257(a), in that the highest court of the State of Texas in which a decision could be had has rendered judgment, and the Petitioner claims rights under the Fifth and Fourteenth Amendments of the U.S. Constitution.

On February 28, 2002, Petitioner filed a Writ of Habeas Corpus with the Texas Supreme Court which was denied on March 1, 2002, motion for rehearing filed on April 2, 2002, expeditiously denied April 8, 2002.

CONSTITUTIONS AND STATUTES INVOLVED

1. United States Constitution, Fifth, Tenth, and Fourteenth Amendments

   Fifth Amendment: Due Process

   Tenth Amendment: Reserve Powers

   Fourteenth Amendment: Due Process and Equal Protection Under the Law

   > Fifth Amendment. . . . nor be deprived of life, liberty or property, without due process of law;. . . .
   >
   > Tenth Amendment. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
   >
   > Fourteenth Amendment. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Texas Constitution of the State of Texas, Art. 1 § 18

   > Sec. 18. No person shall ever be imprisoned for debt.

3. Texas Rules of Civil Procedure, Rule 329b

   > TRCP 329b(a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.

TRCP 329b(c) In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.

TRCP 329b(d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct or reform the judgment within thirty days after the judgment is signed.

TRCP 329b(e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.

TRCP 329b(f) On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render judgment nunc pro tunc under Rule 316, and may also sign an order declaring a previous judgment or order to be void because signed after the court's plenary power has expired.

4. Texas Government Code, 21.002(d)

§ 21.002(d). An officer of a court who is held in contempt by a trial court shall, on proper motion filed in the offended court, be released on his own

personal recognizance pending a determination of his guilt or innocence by a judge of a district court that is not the offended court. The presiding judge of the administrative judicial district in which the alleged contempt occurred shall appoint a judge of a district court other than the offended court to determine the guilt or innocence of the officer of the court.

STATEMENT OF THE CASE

Statement of Facts

Plaintiffs sued Vanderbilt Mortgage and Finance, Inc., CMH Homes, Inc. dba Clayton Homes and Crest Ridge Homes, Inc. over a defectively constructed manufactured home. Vanderbilt and Clayton answered, filed counter-claim and cross-claim against Crest Ridge. Attorneys entered into an agreed order for the depositions of the plaintiffs. Petitioner substituted as attorney for plaintiffs without permission, depositions not attended, sanctions sought, imposed upon plaintiffs and Petitioner.

Court orally ordered plaintiffs to attend new depositions, not attended, order reduced to writing, sanctions sought, hearing set for day plaintiffs' counsel was set for jury trial elsewhere. Court personnel, defense counsel advised of plaintiffs' counsel's whereabouts. Sanctions heard, plaintiffs' pleadings stricken, default judgment entered, monetary sanctions imposed against plaintiffs and Petitioner. Premature motion for new trial filed, heard, denied. Court imposed monetary sanctions for frivolous pleadings against plaintiffs and Petitioner. Motion for severance filed, heard, order entered February 27, 2001. Plaintiffs filed motion for new trial March 19,

2001, heard, granted April 3, 2001, judgment and sanctions set aside. Motion for rehearing timely filed by Vanderbilt and Clayton, not timely heard. Motion for contempt brought against plaintiffs and Petitioner. At hearing, counsel for Vanderbilt and Clayton advised court contempt only sought against Petitioner. Hearing reset. New hearing. Plaintiffs not put on notice to be present, hearing only to be against Petitioner. Judge Specia vacated order of April 3, 2001 which had granted plaintiffs a new trial and had vacated sanctions theretofore imposed against plaintiffs and Petitioner, prior judgment and prior sanctions reinstated. The effect of Judge Specia's actions was to suddenly, without notice, without trial, without hearing, without a motion pending before him, reimpose the judgment for $27,963.57 against the plaintiffs, as well as $12,200.00 in monetary sanctions against plaintiffs and Petitioner. The reason given for this action was that the Defendants Vanderbilt and Clayton had not been given notice of the hearing of April 3, 2001 by certified or registered mail, but by first class mail which did not comply with TRCP 21a. It was admitted by Defendants Vanderbilt and Clayton in their motion for rehearing on pgs 3-4, they had received actual notice of the setting but had not read it.

Plaintiffs filed for Writ of Mandamus in the Fourth Court of Appeals on October 29, 2001, Cause No. 4-01-00703-CV, seeking to vacate the order entered by Judge J. Specia, Jr. setting aside the order granting the motion for new trial. Writ of Mandamus was denied on December 17, 2001 by Per Curium decision. Motion to Show Cause why Petitioner should not be held for contempt reset by Judge John J. Specia, Jr. for December 28, 2001. Plaintiffs and Petitioner filed Notices of Appeal on December 27, 2001,

trial court so informed. Judge Specia reset Motion for Show Cause for January 9, 2002. On January 9, 2002, plaintiffs and Petitioner filed for Writ of Prohibition in the Fourth Court of Appeals, denied. Motion for contempt heard and Judge Specia stated he would enter his order later. Order entered on the 16th day of January, 2002, holding Hector P. Gonzalez in contempt. Petitioner orally requested that he be released on personal recognizance and that a new judge be appointed as per Texas Government Code 21.002(d), denied.. Petitioner filed the bond imposed by the Court and filed a Petition for Writ of Habeas Corpus in the Fourth Court of Appeals on January 24, 2002 which was denied on January 31, 2002. Petitioner filed Motion for Rehearing on February 14, 2002 which was denied on February 20, 2002 by Per Curium decision. Petitioner filed Petition for Writ of Habeas Corpus in The Supreme Court of Texas on February 28, 2002 which was denied on March 1, 2002. Motion for Rehearing filed on April 2, 2002 and denied April 8, 2002.

REASONS FOR GRANTING THE WRIT

Over thirty (30) years ago when Petitioner started practicing law, most members of the judiciary did not style their hair nor cap their teeth nor use French deodorants or perfumes. Neither did they shirk their responsibilities by not confronting the issues nor did they fail to write opinions in which they listed the reasons or basis for their decisions. It is true they did not have great profiles but they had courage.

When I think of those principled men, I am often reminded of the statement made by Mrs. Eleanor Roosevelt when asked about then Senator John Kennedy, which was, "I wish he would show a great deal more courage and a whole less profile." In the case at bar one does not have to be a law school professor to note, to discover, to understand, that Petitioner's due process rights have been violated and trampled on, not once but many times. Irrespective of the fact that these actions are very obvious, the appellate courts below commencing with the Fourth Court of Appeals of Texas and the Texas Supreme Court have neglected, or refuse to recognize its responsibility to enforce the United States Constitution. They shirk their responsibility by not looking at the evil act in the face, by not calling it what it is; they protect it by simply refusing to look at it, by refusing to give a written opinion giving the reason or logic behind their denial of Petitioner's Writ of Habeas Corpus by Per Curium decision. I have seen these persons; they do look good, they style their hair, their clothes are groomed, their black robes are freshly pressed and their profiles look good, but they have shirked their responsibility by refusing to protect the rights of the Petitioner from the arbitrary decisions of the trial court below.

This Court should not sit tranquilly by permitting inferior courts to shirk their responsibilities, to forget or ignore the rights for which so many men have shed their blood and given their lives for, just because it is politically unwise to make decisions they are being paid to make.

The Petitioner is a gadfly, a consumer advocate, who has brought hundreds of lawsuits against the manufactured homes industry, and has been successful; but his success ratio is rapidly shrinking due to the arbitration

clauses that are now part of almost all manufactured home sales. The manufactured home industry has become all too aware that it can sell its shoddy products to naive, gullible consumers and not face the wrath of judges and juries just by having the naive, gullible consumers sign arbitration agreements. Irrespective of these agreements, Petitioner continues to tilt against this industry and earn their ire and hate. They, in turn, have used sanctions as an offensive weapon against Petitioner and have informed him they are willing to withdraw from their attacks upon an offer from Petitioner to not sue them any more on behalf of any future clients and to withdraw from his representation of those persons who have claims against the defendants below. When Petitioner refused to so dishonor himself, the intensity of the attacks mounted but have concentrated in this court in which they have been very successful in getting sanctions imposed against Petitioner as part of their scheme to punish Petitioner for his representation of those persons they have duped into buying their product.

Petitioner is well aware that the opposing side is going to raise a clamor denying Petitioner's allegations. It is Petitioner's intention that once they do this he will offer to take a polygraph test by any examiner used by the F.B.I. Local office in Washington, D.C., and challenge attorney for the Defendants to also do the same.

The court cannot and should not stand tranquilly by and permit the courts of this great land to be used offensively to punish attorneys who stick up for the poor consumers who have been lied to and duped by the manufactured home industry.

The decision below squarely conflicts with this court's decisions.

The trial court below in a hearing in which no notice had been given that any effort was to be made to set aside or vacate the April 3, 2001 order granting Plaintiffs a new trial and vacating all sanctions there before imposed, without any motion seeking to set aside the April 3, 2001 order, the court on his own on October 4, 2001 set aside and vacated the order granting new trial which had been executed over 200 days before. In so doing, the court's decision conflicted directly with the opinion of this court. See *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86, 108 S.Ct. 896, 899-900 (1988). In that case the failure to serve a party was sufficient to void the judgment taken once the bill of review attacking the judgment was filed and heard.

In the case before the court, the Defendants filed a motion for reconsideration timely, motion was not heard within the time requisites of TRCP 329b(c) which states that if said motion is not determined by written order signed within seventy-five (75) days after the judgment was signed it shall be considered overruled by operation of law on expiration of that period.

The order complained of was signed April 3, 2001 which granted Plaintiffs a new trial. The motion for reconsideration filed by the Defendants was overruled by operation of law on June 17, 2001. Under TRCP 329b(e), the trial court below had plenary power to vacate the order complained of up to thirty (30) days after Defendants' motion for reconsideration had been overruled by operation of law, which had occurred on June 17, 2001, thus retaining power over said order until July 17, 2001.

The order granting Plaintiffs new trial was not vacated until October 4, 2001, long after the court had lost plenary power to take this action in violation of TRCP 329b(e). *Porter v. Vick*, 888 S.W.2d 789, 789-90 (Tex. 1994) (orders signed outside plenary period that set aside granting of new trial was void).

It is clear from the rule and the cases construing same that the trial court has the power to set aside an order granting new trial (and reinstate the judgment) for 105 days. The court below in reinstating the judgment did so well past its plenary power and in so doing violated the petitioner's due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution.

It is clear from reading the initial paragraph from Appendix – which is the order reinstating the judgment that among all the motions before the court, one cannot find a motion for reconsideration, a motion for new trial or a bill of review requesting this action from the trial court. In taking the actions it took, the court did so without notice to the Plaintiffs or to the Petitioner denying them the right to prepare for the hearing, the right to bring witnesses, to confront the people supporting such a move, the right to cross-examine and as a result thereof the due process rights of the Petitioner herein guaranteed under the Fifth and Fourteenth Amendments were violated.

Furthermore, under Article 1 § 18 of the Texas Constitution, a person cannot be imprisoned for debt.

The following cases stand for the broad proposition that one cannot be imprisoned for debt. *In re Roberts,* 584 S.W.2d 925 (Civ.App. – Dallas 1979); *Ex parte Rogers,* 633 S.W.2d 666 (Ct.App. – Amarillo 1982); *Wallace v. Briggs,*

162 Tex. 485, 348 S.W.2d 523, 525-526 (1961, orig. proceeding); *In re Weise,* 1 S.W.3d 246, 249 (Tex.App. – Corpus Christi 1999, orig. proceeding); *Ex parte Dolenz,* 893 S.W.2d 677 (Tex.App. – Dallas 1995, orig. proceeding); *Ex parte Jackson,* 590 S.W.2d 775 (Ct.App. – El Paso 1979). These cases are part and parcel of our state judicial system and national system of laws. If one was to cite every case that stood for the broad proposition that one cannot be incarcerated for debt, there would not be room within the confines of this brief. The trial court erred in ruling against all the existing precedents. There is no reason, either in law or in equity, for the broad rule that one cannot be incarcerated for debt be changed by this case. The act of incarcerating Petitioner for debt is a violation of his due process rights.

It is clear that the rule of law followed by the Texas Supreme Court and the intermediate courts is that one cannot be imprisoned for debt even if the debt is for attorneys fees. This is not the rule that was followed in this case. The trial judge below ignored the Texas Constitution, chose not to follow the precedent set by the Texas Supreme Court and entered orders incarcerating Petitioner for debt in violation of his due process rights granted Petitioner under the Fifth and Fourteenth Amendments of the U.S. Constitution.

The list goes on. Petitioner is an officer of the court and as a result under Texas Government Code 21.001(d), he is entitled to be released on his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court that is not the offended court. Irrespective of the law, the trial court below ignored the request of Petitioner herein to have another judge appointed to determine his guilt or innocence of the contempt

he was charged with, held him in contempt, ordered his incarceration and denied him the right to have his guilt or innocence determined by another judge, violating the due process rights Petitioner has under the Fifth and Fourteenth Amendments of the U.S. Constitution.

Petitioner filed a notice of appeal to the Fourth Court of Appeals on the 27th day of December, 2001 and, in so doing, divested the trial court below of its jurisdiction over the subject matter and the Petitioner, and the court was so advised. Irrespective of the precedence established by the Supreme Court of Texas in the case of *Ex parte Boniface,* 650 S.W.2d 776 (Tex. 1983) and its progeny, precedence has existed since that case in 1983 for the proposition that the trial court loses jurisdiction to hear motions for contempt, to enforce prejudgment orders once jurisdiction has been vested in the appellate court as occurred when the Petitioner filed his notice of appeal in this case and the orders of Judge Specia on the 27th day of December, 2001. The trial court chose to ignore the law, chose to ignore precedence, went ahead and held hearings, held Petitioner in contempt and imposed the penalty of incarceration and ordered he be incarcerated – all in violation of the due process rights due Petitioner under the Fifth and Fourteenth Amendments of the U.S. Constitution.

The above legal proceedings, enforced by public authority not sanctioned by age or custom or newly devised in the discretion of the legislative power, did not have any regard nor did it seek to preserve those principles of liberty and justice that are inherently part of that area of the law that we call due process of law and as such were in violation of the rules of due process of law set forth by this court in the case of *Hagar v. Reclamation Dist.*, 111

U.S. 701, 708 (1884); *Hurtado v. California,* 110 U.S. 516, 537 (1884).

A review of the facts of the case as well as the actions of the trial court below it is clear that the law did not operate alike upon all and subjected the Petitioner to the arbitrary exercise of judicial power unrestrained by established principles of private rights and distributive justice and thus violated the due process rights of the Petitioner herein.

Summary

The Petitioner is entitled to protection under the Bill of Rights of the U.S. Constitution. He is entitled to have the state courts recognize and enforce the supreme law of the land.

This Court should not sit tranquil while State appellate courts neglect – or refuse to recognize – their responsibility to enforce the Bill of Rights requisite under the Supremacy Clause of the U.S. Constitution, U.S. Const. Art. VI, cl. 2.

This case is replete by the court's total disregard of its responsibility to guarantee those persons that appear before it those protections guaranteed the people by the U.S. Constitution and the Bill of Rights, commencing by the court unilaterally taking action in violation of established rules of civil procedure, in violation of precedence set by the U.S. Supreme Court. In reinstating a judgment well past the court's plenary period without having a written motion filed before it, without having complied with one of the most essential elements of due process, the giving of notice to those parties affected by it, without

giving each individual the opportunity to be heard, reimposed a judgment against plaintiffs for a sum in excess of $27,000.00 and sanctions against plaintiffs and Petition in a sum in excess of $12,000.00 in a total, complete disregard for established rules and procedures. The end result being a complete denial of Petitioner's rights under the Fifth and Fourteenth Amendments of the U.S. Constitution. The Court did not stop there. It went on to hold Petitioner in contempt for failure to pay those sanctions the court had reinstated, and took this action at a time the trial court no longer had jurisdiction over the subject matter or the person of the Petitioner. Due to a notice of appeal jurisdiction was vested in the appellate court and established precedent set forth the rule that once this occurred, the trial court lost jurisdiction to enforce its prejudgment orders of contempt. The trial court continued its illegal path by totally disregarding Article I § 18 of the Texas Constitution which prohibits that a person can be imprisoned for debt and imposed incarceration upon Petitioner for failure to pay the attorney's fees that had been imposed as sanctions. Not content with having done all of the above, the trial court then proceeded to deny Petitioner, an officer of the court, his right to have his guilt or innocence determined by another judge, all in violation of Texas Government Code 21.002(d). The orders of the trial court were appealed to the Fourth Court of Appeals, The Texas Supreme Court, all who refused to hear the case and denied the applications for writ of habeas corpus. It was at that time the decision was made to take this matter to this Honorable Court. The buck stops here. Petitioner is aware of the almost insurmountable odds that exists

against him hearing from this Honorable Court but he has no choice, where else can he go.

CONCLUSION AND PRAYER

For the foregoing reasons, the petition for a writ of certiorari should be granted and this cause set for briefing and oral argument and an order should be entered granting petitioner's writ of habeas corpus.

Respectfully submitted,

HECTOR P. GONZALEZ

Date: July 11, 2002

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

March 01, 2002

Mr. Hector Gonzalez
Hector P. Gonzalez Law Office
P. O. Box 3728
Alice, TX 78333

Mr. William E. Walton
Law Offices of Ed Walton
401 N. Adelaile [sic]
Terrell, TX 75160

RE: Case Number 02-0178
Court of Appeals Number: 04-02-00073-CV
Trial Court Number: 99C105831 [sic]

Style: IN RE HECTOR P. GONZALEZ

Dear Counsel:

Relator's petition for writ of habeas corpus in the above styled case was this day denied by the Supreme Court.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

cc: Mr. Herb Schaefer, Clerk
Mr. Reagan Greer, Clerk
Honorable John J. Specia, Jr.

Enclosure

App. 2

The State of Texas Seal

THE SUPREME COURT OF TEXAS

Orders Pronounced March 1, 2002

MISCELLANEOUS

THE FOLLOWING PETITION FOR WRIT OF HABEAS CORPUS IS DENIED:

02-0178 IN RE HECTOR P. GONZALEZ

COURT OF APPEALS
FOURTH COURT OF APPEALS
DISTRICT OF TEXAS
SAN ANTONIO, TEXAS

[SEAL]

OPINION

No. 04-02-00073-CV

IN RE Hector P. **GONZALEZ**

Original Habeas Corpus Proceeding
Arising from the 131st Judicial District Court,
Bexar County, Texas
Trial Court No. 2001-CI-02890
Honorable John J. Specia, Jr., Judge Presiding

PER CURIAM

Sitting: Phil Hardberger, Chief Justice
Paul W. Green, Justice
Sandee Bryan Marion, Justice

Delivered and Filed: February 13, 2002

PETITION FOR WRIT OF HABEAS CORPUS DENIED

The court has considered relator's petition for writ of habeas corpus. The court is of the opinion that relief should be denied. Accordingly, relator's petition for writ of habeas corpus is denied. *See* Tex. R. App. P. 52.8(a). Relator shall pay all costs incurred in this proceeding.

PER CURIAM

DO NOT PUBLISH

The State of Texas Seal

THE SUPREME COURT OF TEXAS

Orders Pronounced April 8, 2002

MISCELLANEOUS

ORDERS ON MOTION FOR REHEARING

THE MOTION FOR REHEARING IN THE FOLLOWING PETITION FOR WRIT OF HABEAS CORPUS IS DENIED:

02-0178 IN RE HECTOR P. GONZALEZ

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

April 08, 2002

Mr. Hector Gonzalez
Hector P. Gonzalez Law Office
P. O. Box 3728
Alice, TX 78333

Mr. William E. Walton
Law Offices of Ed Walton
401 N. Adelaile [sic]
Terrell, TX 75160

RE: Case Number 02-0178
Court of Appeals Number: 04-02-00073-CV
Trial Court Number: 99C105831 [sic]

Style: IN RE HECTOR P. GONZALEZ

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above styled petition for writ of habeas corpus.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca E. Morin
Blanca E. Morin, Deputy

cc: Mr. Herb Schaefer, Clerk
Mr. Reagan Greer, Clerk
Honorable John J. Specia, Jr.

Enclosure

The State of Texas Seal

COURT OF APPEALS
Fourth Court of Appeals District
Bexar County Justice Center, Suite 1200
300 Dolorosa
San Antonio, Texas 78205-3037

February 20, 2002

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Ed Walton
Law Offices of Ed Walton
401 N. Adelaide Street
Terrell, TX 75160

Honorable John J. Specia, Jr.
Judge, 225th District Court
Bexar County Courthouse
100 Dolorosa
San Antonio, TX 78205

RE: Court of Appeals Number: 04-02-00073-CV
Trial Court Case Number: 1999-CI-05831 and
2000-CI-02890

Style: In re Hector P. Gonzalez

After examination of the record in the above styled and numbered cause, the Court DENIES Appellant's Motion for Rehearing.

ORDERED the day and year first above written.

Very truly yours,
HERB SCHAEFER, CLERK
/s/ Elise Dixon
Elise Dixon, Deputy Clerk
Ext. 3261

Cause No. 99 CI05831

Sheila Garza and Isidra Garza	§	131st District Court
	§	
vs.	§	Bexar County, Texas
CMH Homes D/B/A	§	
Clayton Homes, et al	§	

Came today the motion for new trial herebefore filed by the Plaintiffs herein and after having heard evidence and arguments of counsel for the Plaintiffs, attorney for the Defendants did not appear.

The Court is of the opinion that the motion should be granted and it is granted herein and all prior orders granting writ of sequestration and sanctions are withdrawn and rescinded.

Signed this the 3rd day of April, 2001.

/s/ David Berchelmann, Jr.
Judge Presiding
4-3-01

Hector P. Gonzalez
Bar I.D. 08127000
P. O. Box 3728
Alice, Texas 78333

Cause No. 99CI05831

SHEILA GARZA AND ISIDRA GARZA	§	IN THE 131st DISTRICT COURT
Plaintiffs	§	
VS.	§	IN AND FOR
CREST RIDGE HOMES, INC.	§	BEXAR COUNTY,
Defendant	§	TEXAS

MOTION FOR REHEARING

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, CMH Homes, Inc., who files this motion and in support thereof would show as follows:

1. **First Motion for Sanctions** – 16TH day of October, 2000 the Court entered an order entitled Agreed Order on Motion to Quash (hereafter referred to as "the Order") in which the Plaintiffs, Isidra Garza and Sheila Garza, were ordered to appear on November 1, 2000 to present themselves for deposition at 9:00 a.m. and 1:30 p.m., respectively;

2. The Plaintiffs' attorney, Hector P. Gonzales [sic], received a copy of the Order, signed by the Court on the 24th day of October, 2000;

3. Neither Plaintiff presented themselves for deposition at the date and time set forth in the Order;

4. On November 20, 2000, the Court ordered that the Plaintiffs, Isidra Garza and Sheila Garza, shall present themselves for deposition at the Law Offices of John

Dwyre, 6655 First Park Ten, Suite 228, San Antonio, Texas 78213 at 9:00 a.m. on the 24th day of November, 2000.

5. On November 20, 2000, the Court further ordered that the Plaintiffs and their attorneys shall pay to Ed Walton, attorney for the Movants, the sum of four thousand dollars ($4,000.00), on or before 5:00 p.m. on 20th day of January, 2001.

6. Neither Sheila Garza, Isidra Garza, or their attorney, appeared for the depositions on November 24, 2000 as ordered by the Court. Neither have the plaintiffs or their attorney paid the attorney's fees as ordered by the Court.

7. **Second Motion for Sanctions** – After the Plaintiffs failed to appear at the court-ordered depositions, for the second time, the Defendant filed their Second Motion for Sanctions which was heard on December 11, 2001.

8. Neither the plaintiffs nor their attorney appeared for the hearing on the Second Motion for Sanctions.

9. Based on the conduct of the plaintiffs and their attorney, the Court struck the plaintiffs' pleading and entered a default judgment in favor of the defendant on their counter-claim.

10. **First Motion for New Trial** – On or about December 28, 2000, the plaintiffs filed a motion for new trial which was heard by the Court on February 12, 2001.

11. The Court, in all things, overruled the plaintiffs motion for new trial and ordered the plaintiffs and their attorneys to pay $3,200.00 in attorney's fees, have been paid to date. [sic]

12. **Second Motion for New Trial** – The plaintiffs filed their second Motion for New Trial (although it was not labeled as such) on or about March 19, 2001.

13. The defendants received the plaintiffs [Second] Motion for New Trial on March 19, 2001 by facsimile. However, there was no notice of hearing included with the referenced motion.

14. The Plaintiffs subsequently sent a copy of their [Second] Motion for New Trial, by regular first class mail (hereafter referred to as "the Second Mailing"). This mailing appeared to be identical to the documents received by facsimile referred to in Paragraph 18, above. [sic]

15. Several days after April 3, 2001, the Defendant discovered that the Second Mailing including a notice that the [Second] Motion for New Trial was set for hearing on that date.

16. Upon examining the Court's file, the Defendant was unable to find an order relating to this [Second] Motion for New Trial. It was not until May 25, that the Defendant discovered a signed, handwritten order granting a new trial in the Court's file.

17. The Defendants would show that the [Second] Motion for New Trial was untimely, having been filed more than thirty days after all timely filed motions for new trial had been overruled. See Rules 329(b) and (c) TEX. RULES CIV. PROC.

18. The Defendants would further show that the alleged service of notice of the hearing was improper pursuant to Rule 21a TEX. RULES CIV. PROC. in that notice of the hearing was not sent "either in person or by agent or courier receipted delivery or by certified or

registered mail to the party's last know [sic] address, or by telephonic document transfer . . . "

19. **Motion to Sever** – Following the granting of the judgment in this cause of action, the Defendant filed a Motion to Dismiss for Want of Proseution [sic] and/or Motion to Sever. The Court entered its Order Granting Severance which ordered that "all matters relating to Defendants, CMH Homes, Inc. d/b/a Clayton Homes and Vanderbilt Mortgage and Finance, Inc. (hereafter collectively referred to as "CMH") and Plaintiffs are hereby severed and shall be given a difference [sic] cause number by the clerk of this court."

20. The severed cause of action was given Cause No 2001-CI-02890 by the Clerk of the Court.

21. At the time that the [Second] Motion for New Trial was presented to the Court, CMH was not a party to this suit and the Court lacked jurisdiction to grant a new trial in the proceeding in which it was presented.

22. CMH is firmly of the opinion that the order granting a new trial signed by the Court in this cause of action is, and was, a nullity, as set forth in Paragraphs 17, 18, and 21, above. The request that such order be set aside is sought out of an abundance of caution, only.

23. Pleading in the alternative, and not by way of election, CMH requests that the Court make a finding that the order granting a new trial in this case is, in fact, a nullity.

24. The Defendants further request that the Plaintiffs and their attorney be ordered to pay to CMH and their attorney a reasonable sum to compensate them for the attorneys fees incurred 1) in the preparation of this

motion, 2) in the presentation of this motion to the court and requesting a hearing on same, 3) in traveling from Dallas to San Antonio for a hearing on these matters, 4) in preparing for and attending a hearing on these matters, and 5) in returning to Dallas from San Antonio.

25. **Certificate of Conference** – On May 29th, 2001, the undersigned attempted to contact Hector Gonzales [sic], attorney for the Plaintiffs, but was unable to speak with him. This attorney has numerous cases pending with Mr. Gonzales [sic] and has been involved in other cases with Mr. Gonzales [sic]. Despite dozens of attempts to do so, the undersigned has never once been able to speak with Mr. Gonzales [sic] except on one occasion when Mr. Gonzales [sic] contacted the undersigned by telephone for purposes of his own.

WHEREFORE, the Defendants respectfully request that the Court set these matters for hearing, that the Court grant all relief requested or suggested herein and for such other and further relief, both at law and in equity, to which the Defendants may be justly and legally entitled.

Respectfully Submitted,

Ed Walton
8300 Douglas, Suite 800
Dallas, Texas 75225
(214) 706-9325
(214) 706-9386 (Facsimile)

/s/ Ed Walton
Ed Walton
SBN: 20828550

Certificate of Service

This is to certify that a true and correct copy of this instrument has this day been forwarded to Hector P. Gonzales [sic], 3883 [sic] Highway 44 East, Alice, Texas 78333.

Signed this 29th day of May, 2001.

/s/ Ed Walton
Ed Walton

Cause No. 99CI05831

SHEILA GARZA AND ISIDRA GARZA Plaintiffs	§ § § §	IN THE 131st DISTRICT COURT
VS.	§ §	IN AND FOR
CREST RIDGE HOMES, INC. Defendants	§ § §	BEXAR COUNTY, TEXAS

ORDER SETTING ASIDE GRANT OF NEW TRIAL

On the 1st day of October, 2001 the Court called for hearing the Third Motion for Sanctions and Second Motion for Contempt of the Defendants, CMH Homes, Inc. and Vanderbilt Mortgage and Finance, Inc. (hereafter referred to, respectively, as "CMH" and "VMH"), and the Special Exceptions to Show Cause Order, Motion to Dismiss Show Cause Order, Motion to Dismiss Third Motion for Sanctions and Second Motion for Contempt for Failure to Plead a Cause of Action, Motion to Dismiss Third Motion for Sanctions and Second Motion for Contempt for Failure to Verify the Motions, and Motion to Dismiss Third Motion for Sanctions and Second Motion for Contempt for Lack of Jurisdiction, filed by the Plaintiffs and/or their attorney, Hector P. Gonzales [sic]. All of the hearings referenced herein were called to be heard in Cause No. 2001-CI-02890 styled *Sheila Garza and Isidra Garza vs. CMH Homes, Inc. d/b/a Clayton Homes and Vanderbilt Mortgage and Finance, Inc.* pending before the 131st District Court in and for Bexar County, Texas.

CMH and VMH appeared by their attorney of record. Hector P. Gonzales [sic] appeared in person and by his attorney of record, Mills Latham.

Ed Walton (attorney for CMH and VMH) testified that proper notice regarding the hearing on Plaintiffs' second Motion for New Trial was not received by CMH and/or VMH, such hearing being held in this Court on April 3, 2001.

After hearing the evidence and arguments of counsel the Court finds as follows:

1. that a Motion for New Trial was filed by the Plaintiffs had been denied by the Court on February 12, 2001;

2. that, subsequent to the denial of the first Motion for New Trial, the Plaintiffs filed a second Motion for New Trial which was set for hearing on April 3, 2001;

3. that neither CMH or VMH was given proper notice of the hearing on the second Motion for New Trial;

4. that CMH and VMH had previously filed a Motion for Rehearing in this cause of action;

5. that the order of the court dated April 3, 2001, entered by the Honorable David Berchelmann should be set aside for all purposes;

6. because of the facts, issues and circumstances surrounding these matters, the Honorable John Specia presiding, will retain jurisdiction over all other matters herein;

IT IS FURTHER ORDERED that all further matters in this cause of action shall be heard by the Honorable John Specia.

SIGNED this ___ day of _____, 2001.

(DATE STAMP) OCT-4 2001

/s/ John Specia
JUDGE PRESIDING

Agreed as to Form:

/s/ James Montgomery for
Mills Latham, Attorney for
Hector P. Gonzales [sic]

/s/ John Dwyre
John Dwyre, Attorney for
CMH Homes, Inc. and
Vanderbilt Mortgage and
Finance, Inc.

Cause No. 99CI05831

SHEILA GARZA AND ISIDRA GARZA	§	IN THE 131st DISTRICT COURT
Plaintiffs	§	
VS.	§	IN AND FOR
CREST RIDGE HOMES, INC.	§	BEXAR COUNTY,
Defendant	§	TEXAS

MOTION FOR ENTRY OF ORDER NUNC PRO TUNC

On the 1st day of October, 2001 the Court entered an order that was approved as to form by both of the parties. A clerical error exists in that the Order does not dispose of or address the Court's oral order regarding the granting of new trial entered by Judge Berchelmann. In fact, the Order that was circulated amongst the parties had the following language:

> IT IS THEREFORE ORDERED ADJUDGED AND DECREED that the order of this Court, entered by the Honorable David Berchelmann on April 3, 2001 granting a new trial in this cause of action is hereby set aside for all purposes.

It was the intention of the parties to comply with the Court's Order and to submit the Order to the Court following its ruling regarding Judge Berchelmann's ruling.

It was a clerical error that the final Order proposed to the Court on this matter did not have the language listed above. Attorneys for Defendant discussed this with Attorneys for Plaintiff and Respondent who have agreed as to form with the language of the Judgment Nunc Pro Tunc.

WHEREFORE PLAINTIFF RESPECTFULLY PRAYS that this Court enter the Judgment Nunc Pro Tunc as agreed to in form by the parties.

Respectfully submitted,

John Dwyre & Associates
6655 First Park Ten, Suite 228
San Antonio, Texas 78213
(210) 736-1772
(210) 736-5299 (fax)

/s/ John Steven Dwyre
John Steven Dwyre
Texas State Bar Number 06307400

Attorney for CMH Homes, Inc.
and Vanderbilt Mortgage and
Finance, Inc.

CERTIFICATE OF CONFERENCE

The undersigned below certifies that he has communicated his intention to file this Nunc Pro Tunc Order Setting Aside Grant of New Trial to Mills Latham, attorney for Hector P. Gonzales [sic]. Mr. Latham has indicated his agreement to the entry of the Order and has agreed to the order "approved as to form".

/s/ John Steven Dwyre

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing has been served on all parties or their attorneys of record in accordance with the applicable Rules of Civil Procedure this 10th day of October, 2001.

/s/ John Steven Dwyre

Cause No. 2001-CI-02890

SHEILA GARZA AND ISIDRA GARZA	§	IN THE 131st DISTRICT COURT
VS.	§	
CMH HOMES, INC. d/b/a CLAYTON HOMES and VANDERBILT MORTGAGE AND FINANCE, INC.	§	IN AND FOR BEXAR COUNTY, TEXAS

ORDER ON SECOND MOTION FOR CONTEMPT

On the 9th day of January, 2002 the Court heard the Second Motion for Contempt filed by the Defendants, CMH Homes, Inc. and Vanderbilt Mortgage and Finance, Inc. The Defendants appeared by their attorney of record. The Plaintiffs did not appear. The Plaintiffs' attorney, Hector P. Gonzalez appeared in person and by attorney.

After hearing the evidence and arguments of counsel, the Court is of the opinion that the referenced motion should be granted. The Court finds that Hector P. Gonzales [sic] is in contempt and that he willfully disobeyed the orders of the Court in failing to follow the orders of the Court when ordered to:

1. pay to Ed Walton, attorney for CMH, the sum of four thousand dollars ($4,000.00) on or before 5:00 p.m. on 20th day of January, 2001 as ordered by the Court on November 27, 2000; and/or

2. pay to Ed Walton, attorney for CMH, the sum of five thousand dollars ($5,000.00) on or before 5:00 p.m. on 11th day of January, 2001 as ordered by the Court on December 11, 2000; and/or

3. pay to Ed Walton, attorney for CMH, the sum of three thousand, two hundred dollars ($3,200.00) on or before the 12th day of February, 2001 as ordered by the Court on the 12th day of February, 2001;

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that Hector P. Gonzales [sic] shall pay to Ed Walton the sum of twelve thousand two hundred and no/100 dollars ($12,200.00) on or before 5:00 p.m. on January 21, 2002.

IT IS FURTHER ORDERED that, in the event that Hector P. Gonzales [sic] does not pay to Ed Walton the sum of $12,200.00 as ordered herein, that he is to personally appear before this Court on or before 5:00 p.m. on January 21, 2002 at which time he shall be confined in the County Jail of Bexar County, Texas until such time as he has purged himself of contempt by payment of the sums of money as ordered by the Court, but in not [sic] event shall the said Hector P. Gonzales [sic] be confined for a period in excess of six months.

IT IS FURTHER ORDERED that Hector P. Gonzales [sic] shall be allowed to post a personal recognizance bond on or before 5:00 p.m. on January 21, 2002 in the amount of $12,200.00 in the event he desires to seek appellate review of the Court's decision. The bond shall be conditioned upon Hector P. Gonzalez seeking appellate relief on or before January 24, 2002.

IT IS FURTHER ORDERED that, in the event that Hector P. Gonzales [sic] seeks appellate review of the Court's decision on or before January 24, 2002, and the ruling of this Court is upheld by the Texas Supreme Court or, if no relief is sought in the Texas Supreme Court, if the

ruling of this Court is upheld by the Court of Appeals Hector P. Gonzalez is ORDERED to present himself to this Court at 9:00 a.m. on the second business day following the final disposition of the appellate relief sought on or before January 24, 2002 then and there to be confined in the County Jail of Bexar County, Texas until such time as he has purged himself of contempt by payment of the sums of money as ordered by the Court, but in not [sic] event shall the said Hector P. Gonzales [sic] be confined for a period in excess of six months.

SIGNED this 16 day of JAN, 2001.

/s/ John J. Specia, Jr. JUDGE PRESIDING

The State of Texas

County of Bexar

JOHN J. SPECIA, JR.
JUDGE, 225TH DISTRICT COURT
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205

(210) 335-2233

January 16, 2002

VIA FACSIMILE AND FIRST CLASS MAIL

Mr. Mills Latham
Attorney at Law
100 West Houston St.
1500 Frost Bank Tower
San Antonio, Texas 78205

Mr. Ed Walton
Attorney at Law
401 N. Adelaide St.
Terrell, TX 75160

Mr. Hector P. Gonzales [sic]
Attorney at Law
3883 Highway 44 East [sic]
Alice, Texas 78333

RE: CAUSE NO. 2001-CI-02890; IN THE 131ST JUDICIAL COURT; SHEILA GARZA AND ISIDRA GARZA VS. CMH HOMES, INC. D/B/A CLAYTON HOMES AND VANDERBILT MORTGAGE AND FINANCE, INC.

Dear Messrs. Latham, Walton and Gonzalez:

Please be advised that the Texas Supreme Court has informed me that they have denied the Motion for Rehearing on the Writ of Habeas Corpus of Mr. Gonzalez. Additionally, there are no further Motions pending on that Motion for Contempt at this time.

Accordingly, the Court hereby orders Mr. Gonzalez to present himself to this Court at 9:00 a.m. On May 7, 2002

to be remanded to the custody of the Bexar County Sheriff or to present filemarked copies of appeal documents presented to the United States Supreme Court.

Should you have any further questions on this matter, or should you care to discuss it further, please do not hesitate to contact me or my staff attorney, Amber M. Liddell at (210) 335-2300.

Very truly yours,
/s/ John J. Specia, Jr.
John J. Specia, Jr.
Judge, 225th Judicial District

The State of Texas

County of Bexar

JOHN J. SPECIA, JR.
JUDGE, 225TH DISTRICT COURT
BEXAR COUNTY COURTHOUSE
SAN ANTONIO, TEXAS 78205
(210) 335-2233

May 7, 2002

VIA FACSIMILE AND FIRST CLASS MAIL

Mr. Mills Latham
Attorney at Law
100 West Houston St.
1500 Frost Bank Tower
San Antonio, Texas 78205

Mr. Ed Walton
Attorney at Law
401 N. Adelaide St.
Terrell, Texas 75160

Mr. Hector P. Gonzales [sic]
Attorney at Law
3883 Highway 44 East [sic]
Alice, Texas 78333

RE: CAUSE NO. 2001-CI-02890; IN THE 131ST JUDICIAL COURT; SHEILA GARZA AND ISIDRA GARZA VS. CMH HOMES, INC. D/B/A CLAYTON HOMES AND VANDERBILT MORTGAGE AND FINANCE, INC.

Dear Messrs. Latham, Walton and Gonzalez:

Please be advised that I have received a written request for an extension of the deadline for Mr. Gonzalez to present himself to my Court. Based upon Mr. Gonzalez' representations that he is unable to prepare the Writ of Certiorari by May 7, 2002, I hereby order Mr. Gonzalez to present himself to this Court at 9:00 a.m. on May 14, 2002 to be remanded to the custody of the Bexar County Sheriff

or to present filemarked copies of appeal documents presented to the United States Supreme Court.

Should you have any further questions on this matter, or should you care to discuss it further, please do not hesitate to contact me or my staff attorney, Amber M. Liddell at (210) 335-2300.

Very truly yours,

/s/ John J. Specia, Jr.
John J. Specia, Jr.
Judge, 225th Judicial District